

**PALERMO WELLFIELD ENVIRONMENTAL TRUST  
TRUST AGREEMENT**

This Palermo Wellfield Environmental Trust Agreement (Agreement) is entered into between and among Southgate Development Co. Inc. (Grantor), and Daniel J. Silver, an individual (Trustee), to establish the Palermo Wellfield Environmental Trust (Trust).

WHEREAS, Grantor is the defendant in a civil action brought by the United States under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607, styled as United States v. Washington State Department of Transportation and Southgate Development Co., (W.D. Wash. No. C05-5447), in which action the United States seeks to recover at least \$11,938,172 costs incurred in response to releases and threatened releases of hazardous substances at the Palermo Wellfield Superfund Site in Tumwater, Washington.

WHEREAS, Grantor seeks to resolve its potential liabilities to the United States in that action without further difficult and protracted litigation.

WHEREAS, entry and execution of a judgment in that action for the full amount of the United States’ costs would likely bankrupt the Grantor.

WHEREAS, Grantor advised certain insurance companies of Grantor’s belief that they had issued insurance policies to Grantor providing coverage for environmental losses or damages, but said insurance companies declined to defend Grantor in this action, provide coverage for Grantor’s insurance claims, or participate in settlement discussions.

WHEREAS, Grantor and the United States have entered into a Consent Decree regarding the Palermo Wellfield Superfund Site (Consent Decree), which includes, among

other things, Grantor's agreement to establish the Trust and Grantor's assignment to the Trust of the Non-Ace/Aetna Claims.

WHEREAS, Grantor has selected Trustee to be the trustee pursuant to this Agreement, and Trustee is willing to act as trustee.

WHEREAS, the Trust is created pursuant to, and to effectuate, the Consent Decree.

NOW, THEREFORE, Grantor and Trustee agree as follows:

## **I. DEFINITIONS**

Whenever terms listed below are used in this Agreement, the following definitions shall apply:

"Beneficiary" shall mean the EPA Hazardous Substance Superfund and any successor instrumentalities of the United States.

"DOJ" shall mean the United States Department of Justice and any successor departments, agencies, or instrumentalities of the United States.

"Grantor" shall mean Southgate Development Co., Inc. and any successors, or assigns.

"ACE/Aetna Policies" shall mean any and all policies of insurance issued by, assumed by and/or novated to any and all member companies of the ACE USA Group of Insurers and Reinsurers to any person or entity, specifically including without limitation policies issued to Grantor by ACE Property & Casualty Insurance Company, formerly known as CIGNA Property & Casualty Insurance Company, formerly known as Aetna Insurance Company and/or ACE Fire Underwriters Insurance Company, formerly known as CIGNA Fire Underwriters Insurance Company, formerly known as Aetna Fire Underwriters Insurance Company, that are alleged to provide coverage for environmental claims relating to the Site.

“Non-Ace/Aetna Policies” shall mean any and all insurance policies issued prior to 2000 to Settling Defendant, or issued to other parties but in which policies Grantor is listed as an additional insured or is entitled to claim the status of third-party beneficiary, for liability for property damage or environmental claims relating to property owned by Grantor at the Site, except and not including ACE/Aetna Policies. The Non-Ace/Aetna Policies include any policies in which Grantor is subsequently determined to have any interest, and any and all potential or actual claims and/or causes of action (including, but not limited to, causes of action based in contract, tort, extra-contractual theories, and statutory claims), pursuant to, and proceeds from, said policies.

“Non-Ace/Aetna Claims” shall mean any right to payment under any and all Non-Ace/Aetna Policies.

“Site” shall mean the Palermo Wellfield Superfund Site in Tumwater, Washington.

“Trust” shall mean the Palermo Wellfield Environmental Trust.

“Trustee” shall mean Daniel J. Silver and any successor trustee.

“United States” shall mean the United States of America, including its departments, agencies, and instrumentalities.

## II. ESTABLISHMENT AND ACCEPTANCE OF TRUST

1. Grantor and Trustee hereby establish the Palermo Wellfield Environmental Trust trust fund (Fund) for the benefit of Beneficiary as stated herein. Grantor and Trustee intend that no third parties have access to the Fund. All property in the Trust, and any and all proceeds therefrom, are intended for the recovery for and reimbursement of Beneficiary.

2. *Cash contribution.* The Fund shall consist of an initial cash contribution of \$30,000 paid into the Trust by Grantor.

3. *Insurance Policies.* The Fund shall consist of the cash contribution and the Non-Ace/Aetna Claims assigned by Grantor to the Trust.

4. *Assignment of Insurance Claims.* Grantor hereby unconditionally transfers, conveys, and assigns to the Trust the Non-Ace/Aetna Claims and any and all potential or actual claims and/or causes of action (including, but not limited to, causes of action based in contract, tort, extra-contractual theories, and statutory claims), pursuant to, and proceeds from, the Non-Ace/Aetna Claims, pursuant to the terms of this Agreement. Grantor retains no rights or residual interest in the assigned claims, causes of action, Non-Ace/Aetna Claims, and proceeds therefrom transferred to the Trust. Recognizing the complete assignment of the Non-Ace/Aetna Claims and any associated claims, proceeds, and causes of action, Grantor's approval is unnecessary to settle, release, or compromise matters involving the assigned Non-Ace/Aetna-Claims and any associated claims, proceeds, and causes of action. Grantor shall have no right to make additional claims or pursue existing claims for defense or indemnity under the Non-Ace/Aetna Claims. Grantor covenants not to assert or claim insurance coverage under the Non-Ace/Aetna Claims after the effective date of this Agreement. Should

the Trust reach a settlement or otherwise resolve an insurance coverage dispute, Grantor acknowledges that it is not entitled to any of the proceeds or any other payments and is estopped from claiming or receiving defense or indemnity coverage under the Non-Ace/Aetna Claims.

5. *Cooperation of Grantor.* Grantor shall fully cooperate in the following tasks:

- a. perform a diligent, good faith search to identify any evidence of Insurance Policies (including, but not limited to, a review of business records, insurance-related invoices, Certificates of Insurance, accounting ledgers, correspondence, or any other insurance-related documentation) in which Grantor may have an interest within 30 days from the effective date of this Agreement;
- b. take such actions and execute and deliver such documents and instruments as may be necessary or appropriate to transfer, convey, release, compromise, and/or assign Grantor's interest pursuant to any or all of the Insurance Policies;
- c. cooperate with Trustee's efforts to pursue claims and/or causes of action under the Non-Ace/Aetna Policies and to avoid any potential interference with Trustee's recovery efforts or management of the Trust and the Fund;

d. identify any documents or sources of documents that, to Grantor's knowledge, may relate to operations, activities, or corporate histories of entities that conducted operations at the Site (Site Records);

e. provide Trustee and the Trust's representatives with full access to Site Records; and

f. provide Trustee and the Trust's representatives with any other assistance necessary to accomplish the duties, purposes, and goals of the Trust, including, but not limited to, the execution of any documents associated with the Trust and its recovery activities in a timely fashion.

6. The Fund shall be held by Trustee, in trust, as hereinafter provided.

7. *Acceptance of Trust.* Trustee, by his execution of this Agreement, agrees that he understands and accepts the Trust established herein; accepts his rights, powers, duties, and responsibilities as Trustee of the Trust; and agrees to perform his duties and responsibilities as Trustee of the Trust.

### **III. TRUSTEE AUTHORITY**

8. Trustee shall have broad discretion and authority to take such actions as Trustee deems necessary or appropriate to pursue claims, payments, and proceeds for the Trust. Trustee is expressly authorized and empowered to take such actions as Trustee in his discretion deems necessary or appropriate to pursue applicable claims. Without limiting Trustee's general discretion and authority granted pursuant to this Section, Grantor and Trustee agree that Trustee shall have the authority to:

- a. initiate and conduct litigation, negotiate, settle, release, compromise, or otherwise adjust all claims, policies, and payments arising under or in connection with the Non-Ace/Aetna Policies or Claims;
- b. engage such outside legal counsel, consultants, accountants, and other independent advisors as Trustee deems necessary or appropriate;
- c. compensate, or arrange or agree to compensate, such persons, using proceeds from the Non-Ace/Aetna Policies or Claims;
- d. make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- e. compromise, liquidate, or otherwise adjust all claims and Trust assets in favor of, or against, the Fund;
- f. purchase and maintain insurance coverage, covering Trustee's personal liability for any acts or omissions in its capacity as Trustee and any other insurance products that are reasonable and appropriate to protect Trustee from personal liability.

#### **IV. TRUST MANAGEMENT**

- 9. *Investing Trust Assets.* Consistent with the liquidity needed to make payments authorized or required by this Agreement, Trustee shall invest the income of the Fund in safe, interest-bearing vehicles. Investments are limited to the following:
  - a. obligations issued or granted by the United States, or any money fund that invests solely in those obligations;

b. obligations issued or guaranteed by any state or municipality in the United States that is rated A or better by Standard & Poor's or A or better by Moody's Investors Service at the time of investment;

c. corporate bonds with an investment grade credit rating of A or better by Standard & Poor's or Prime-1 or better by Moody's Investors Service at the time of investment;

d. certificates of deposit of, accounts with, or other obligations of any bank or corporation provided that 100% of any such certificate of deposit, account, or other obligation is insured by FDIC or FSLIC; and

e. corporate equities with an investment grade rating of A or better by Standard & Poor's.

10. *Trustee's Other Trust Management Duties.* Trustee shall discharge his duties regarding the Fund solely in the interest of Beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing that persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims, consistent with the duties of a fiduciary. Notwithstanding any other provision of this Agreement, Trustee shall not take actions that cause Grantor to incur any personal financial liability.

## **V. TAXES AND EXPENSES**

11. *Taxes and Trustee Compensation.* All taxes of any kind that may be assessed or levied against or in respect of the Trust shall be paid solely from the Fund. The compensation of Trustee and all other expenses incurred by Trustee in connection with the administration of the Trust shall be paid solely from the Fund.

12. *Grantor's Environmental Trust.* For federal income tax purposes only, the Trust hereby established is intended to be an environmental remediation trust as described in U.S. Treasury Regulation § 301.7701-4(e). The Trust shall have no purpose in generating income or profit other than income generated by temporary investment of Trust assets, which income shall be incorporated into the corpus of the Trust and used exclusively for Trust purposes. The Trust has been organized with no objective to continue or engage in the conduct of a trade or business.

## **VI. PAYMENTS FROM THE TRUST**

13. *Payments of Professional Fees and Expenses.* Trustee shall make payments from the Fund to compensate or reimburse Trustee, and persons or entities engaged by Trustee pursuant to Section III of this Agreement. Additionally, pursuant to the preceding Section, Trustee shall make payments from the Fund for taxes and expenses. Upon payment to third parties pursuant to this paragraph, such funds shall no longer constitute part of the Fund as defined herein.

14. *Payments to Beneficiary from Trust.* Trustee shall make all payments to Beneficiary under this Agreement consistent with instructions provided by EPA.

## **VII. ROLE OF GRANTOR**

15. Except as provided in Section II, Grantor shall have no rights, responsibilities, or obligations pursuant to this Agreement. Grantor has no residual interest in or entitlement to the Fund, trust proceeds, or any proceeds of trust assets.

## **VIII. INSPECTION OF RECORDS, AUDITS, AND REPORTING**

16. *Accounting Records and Audits.* Trustee shall keep or cause to be kept proper books, records, and accounts of all transactions relating to the Trust in such form as will enable Trustee to produce all reports and accountings and to submit to any audit required pursuant to this Agreement. If requested by Beneficiary, Trustee shall make available all Trust books and records, including accounting records, to Beneficiary for inspection within five (5) days of Beneficiary's request. If requested by Beneficiary, and in advance of the intended termination of the Trust, Trustee shall arrange for an independent accounting audit and shall furnish Beneficiary with the report and any other documents prepared by the independent accounting auditor.

17. *Quarterly Reports.* Within 30 days after the end of each calendar quarter, Trustee shall provide Beneficiary with a quarterly report summarizing the financial status and activities of the Trust in the previous quarter.

#### **IX. ADVICE OF COUNSEL**

18. Trustee may at any time consult with counsel with respect to any issue regarding construction of this Agreement, or any action to be taken pursuant to the Agreement. To the extent permitted by law, Trustee shall not be liable for actions taken on advice of counsel.

#### **X. TRUSTEE COMPENSATION**

19. Trustee shall be entitled to compensation for its services on a billable hour basis in the amount listed in Exhibit 1.

#### **XI. RESIGNATION, REMOVAL, AND SUCCESSOR TRUSTEE**

20. *Resignation of Trustee.* Trustee may resign at any time, with or without cause, and without the necessity of any court proceeding, by giving not less than 60 days prior written notice to Beneficiary. Such resignation shall take effect on the date set forth in the resignation notice, which shall be a date not less than 60 days after the date Trustee submits the resignation notice to Beneficiary, unless a successor Trustee is appointed sooner pursuant to Paragraph 23 of this Agreement, in which event such resignation shall take effect immediately after the appointment and acceptance of the successor Trustee.

21. *Removal of Trustee.* Notwithstanding any other provision of this Agreement, Trustee may be removed at any time, with or without cause, and without the necessity of any court proceeding, pursuant to an instrument executed by the EPA Region 10 Director of the Office of Environmental Cleanup or its designee and delivered to Trustee.

22. *Successor Trustee.* If Trustee resigns, is removed, or otherwise ceases to act as Trustee, a successor Trustee shall be appointed pursuant to an instrument executed by

Beneficiary without the necessity of any court proceeding. The successor Trustee, by its execution of an addendum to this Agreement, agrees that the successor Trustee understands and accepts the Trust established by this Agreement; accepts the rights, powers, duties, and responsibilities set forth in this Agreement; and agrees to perform Trustee's duties in accordance with this Agreement.

23. *Transfer to Successor Trustee.* Every successor Trustee appointed pursuant to the preceding paragraph shall execute and deliver to its predecessor an instrument accepting its appointment. Thereupon, such successor Trustee, without any further act, deed, or conveyance, shall become fully vested with all the estates, rights, powers, title to Trust assets, trusts, duties, and other Trustee obligations pursuant to this Agreement. Nevertheless, upon written request of the successor Trustee, such predecessor Trustee shall execute and deliver an instrument transferring to such successor Trustee all the estates, rights, powers, title to Trust assets, trusts, duties, and other obligations of such predecessor Trustee pursuant to this Agreement, and every predecessor Trustee shall deliver all assets of the Trust held by it to its successor; provided, however, that before any such delivery is required or made, all allowable fees and expenses of any such predecessor Trustee shall be paid in full.

## **XII. NOTICES**

24. Whenever, pursuant to the terms of this Agreement, written notice or communications are required or authorized, or a report or other document is required or authorized to be sent, the written notice, document, or communication shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give written notice of a change. All notices and submissions shall be considered effective on receipt, unless otherwise provided.

As to Beneficiary:

Jennifer Byrne  
Assistant Regional Counsel  
Office of Regional Counsel  
Region 10  
United States Environmental Protection Agency  
1200 Sixth Avenue, ORC-158  
Seattle, WA 98101

Director, Office of Environmental Cleanup  
Region 10  
United States Environmental Protection Agency  
1200 Sixth Avenue, ECL-111  
Seattle, WA 98101

As to Trustee:

Daniel J. Silver  
606 Columbia Street NW, Suite 212  
Olympia, WA 98501

As to Grantor:

Michael Mayberry  
Owens Davies, P.S.  
1115 West Bay Drive Suite 302  
Olympia, WA 98502

Attorney for Southgate Development Co., Inc.

### **XIII. IRREVOCABILITY AND TERMINATION**

25. *Irrevocability of Trust.* The Trust is irrevocable. Grantor retains no equitable, legal, beneficial, or residual interest in the Trust.

26. *Termination of Trust.* The Trust shall continue until, and Trustee shall terminate the Trust within 30 days after, in the judgment of Beneficiary, (1) all claims against Trustee in its individual and official capacity have been resolved; (2) Trustee has made all valid claims based on the Non-Ace/Aetna Policies and received all proceeds based on the Non-Ace/Aetna Policies, or until the remaining valid claims based on the Non-Ace/Aetna Policies are no longer worthwhile of further recovery efforts; and (3) Trustee has paid all expenses and obligations of the Trust. Upon termination of the Trust, Trustee shall liquidate all remaining Trust property, pay all final Trust administration expenses, and remit the remaining balance of the Trust to Beneficiary pursuant to EPA's payment instructions.

#### **XIV. IMMUNITY AND INDEMNIFICATION**

27. *No Liability of the United States.* Notwithstanding any other provision of the Agreement, neither the United States, nor any agency of the United States, including, without limitation, the EPA, shall be liable to the Trust, Trustee, or Grantor for any damages or payments whatsoever arising out of matters related to the Trust, and Trustee shall not have power to sue the United States in any forum except for the purpose of enforcing the terms of this Agreement.

28. *No Liability of Grantor.* Notwithstanding any other provision of this Agreement, Grantor shall not be liable to the Trust or the Trustee for any damages or payments whatsoever arising out of matters related to the Trust, and Trustee shall not have power to sue the Grantor in any forum except for the purpose of enforcing the terms of this Agreement.

29. *Extent of Liability of Trustee.* Trustee shall not be liable for his acts, omissions, or defaults, regardless of whether or not occasioned by the negligence of Trustee, nor for the acts, omissions, or defaults of any agent or depository employed, appointed, or selected by Trustee, except for such Trustee's own acts, omissions, or defaults occasioned by the gross negligence or willful misconduct of such Trustee. Trustee shall not be responsible for the acts or omissions of any predecessor Trustee nor, in particular, shall Trustee be liable for the exercise or nonexercise of any power or discretion properly delegated pursuant to this Agreement.

30. *Indemnification of Trustee.* To the extent of Trust assets only, the Trust shall indemnify, hold harmless, and defend, to the extent allowed by law, Trustee from any

personal liability to which Trustee may be subjected by reason of any act or omission in Trustee's official capacity, including all expenses reasonably incurred in Trustee's defense.

31. *Survivorship of Protections.* Notwithstanding any other provision of this Agreement, the terms and conditions of Paragraphs 27, 28, and 30 of this Agreement shall survive the termination of the Trust, and this Agreement and may not be altered, amended, or revoked without the consent of the beneficiaries of the protections of those Paragraphs.

32. *No Bond or Insurance Required.* No bond or other security shall be exacted or required of any Trustee appointed by this Agreement.

#### **XV. CHOICE OF LAW**

33. This Agreement shall be administered, construed, and enforced according to the laws of the State of Washington.

#### **XVI. MISCELLANEOUS**

34. *Headings.* Headings to sections and paragraphs of this Agreement are included for the convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Agreement.

35. *Particular Words.* Any word contained in the text of this Agreement shall be read as singular or plural and masculine, feminine, or neuter, as may be applicable or permissible in the particular context. The word "person" shall include an individual, partnership, association, company, corporation, or municipal corporation.

36. *Preservation of Privilege.* In connection with the rights, claims, and causes of action transferred to the Trust, any attorney-client privilege, work-product privilege, or other privilege or immunity attaching to any documents or communications (whether written or

oral) related to the Trust or the assets assigned to the Trust (including, but not limited to, the assets assigned in paragraph 4) shall vest in the Trust and its representatives, and the parties are authorized to take all necessary actions to effectuate the transfer of such privileges.

37. *Prevailing Party.* If Trustee or the Trust, as the case may be, is the prevailing party in a dispute regarding the provisions of this Agreement or the enforcement thereof, Trustee or the Trust, as the case may be, shall be entitled to collect any and all costs, expenses, and fees, including attorneys' fees, from the non-prevailing party incurred in such dispute or enforcement action.

38. *Disputes; Jurisdiction of Court.* All disputes arising between or among Trustee, Grantor, or Beneficiary that cannot be resolved informally shall be resolved in the United States District Court for the Western District of Washington. Trustee and Grantor agree to, and accept the jurisdiction of, the United States District Court for the Western District of Washington for this purpose.

39. *Complete Agreement.* This Agreement contains the final expression and the complete and exclusive statement of the terms of the Agreement between the parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written representations, understandings, and agreements between them with respect thereto.

40. *Authorized Signatories.* Each person signing this Agreement represents and warrants that he or she is duly authorized to enter into this Agreement by the entity on whose behalf the person is signing. Each person signing this Agreement has consulted independent legal counsel regarding the effect of this Agreement and understands the legal ramifications of entering into this Agreement.

41. *Effective Date:* The effective date of this Agreement shall be February 15, 2007.

42. *Severability.* If any provision of this Agreement, or its application to any person in any circumstances, is deemed invalid or unenforceable by a court of law, the application of such provision to other persons and in circumstances other than those to which the provision is invalid or unenforceable, and the other provisions of this Agreement, shall not be affected by such invalidity or unenforceability.

IN WITNESS WHEREOF the parties have executed this Agreement.

GRANTOR:

Daniel Lubbe, President  
Southgate Development Co. Inc.

David Gubbe, President  
Name & Title

91-0723373  
Federal Tax Identification No.

TRUSTEE:

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Daniel J. Silver